Supreme Court
ap. 8. 78. arg
6 Otto 118
Oct. 3. 1877

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 832.

JOHN W. KOHLSAAT AND CHARLES W. KOHLSAAT, EXECUTORS OF JOHN C. KOHLSAAT, DECEASED, PLAINTIFFS IN ERROR,

vs.

THOMAS MURPHY, LATE COLLECTOR OE THE PORT OF NEW YORK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED OCTOBER 8, 1877.



SUPREME COURT OF THE UNITED STATES.

No. 832.

JOHN W. KOHLSAAT AND CHARLES W. KOHLSAAT, EXECUTORS OF JOHN C. KOHLSAAT, DECEASED, PLAINTIFFS IN ERROR,

vs.

THOMAS MURPHY, LATE COLLECTOR OF THE PORT OF NEW YORK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

INDEX.

	Original.	Print.
Writ of error	1	1
Clerk's certificate	4	2
Letters testamentary	6	2
Declaration	10	4
Defendants' plea	14	4
Judgment	15	4
Bill of exceptions	18	5
Bond	46	17
Assignment of errors	50	18
Joinder in errors	54	19
Citation	56	20

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the southern district of New York, greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea, which is in the said circuit court before you or some of you, between John C. Kohlsaat, plaintiff, and Thomas Murphy, late collector of the customs of the United States at and for the port of New York, defendant, a manifest error hath happened, to the great damage of the said John C. Kohlsaat, as is said, and as appears by the complaint of the executors of the last will and testament of the said John C. Kohlsaat;

And it being made to appear to us that after the happening of the error alleged as aforesaid, and rendition of the said judgment, the said John C. Kohlsaat departed this life at his residence in the city of New York, and within the jurisdiction of the said circuit court for the southern district of New York aforesaid, having first duly made and published his last will and testament, wherein and whereby administration of all and singular the goods, chattels, credits, and estate of the
2 said testator and in any way concerning his said last will was granted unto John W. Kohlsaat and Charles W. Kohlsaat, both of the city of New York;

And it is further made to appear that afterwards such proceedings were had by and before Stephen C. Van Schaick, esq., then & still being surrogate in and for the city and county of New York, duly elected and acting as such under and by virtue of the constitution and laws of the State of New York, and duly authorized and empowered to improve and allow and admit to probate last wills and testaments of persons residing and dying in said city, and to make and issue under his hand and official seal letters testamentary to persons named as executors in said last wills and testaments so admitted to probate as aforesaid; that heretofore, on the 22nd day of March, in the A. D. 1876, the said last will and testament of the said John C. Kohlsaat, deceased, was duly proved and approved and admitted to probate by and before the said surrogate, and letters testamentary were then and there executed and issued by and under the hand and official seal of the said surrogate to the said John W. Kohlsaat and Charles W. Kohlsaat, as and being such executors as aforesaid, and authorizing and empowering them, as such executors as aforesaid, in all things to appear in the place and stead and act for the said John C. Kohlsaat, deceased, and to administer upon all and singular the goods, chattels, and credits and es-
3 tate of him, the aforesaid John C. Kohlsaat, deceased; and they, the said executors, did then and there duly qualify and enter upon the discharge of their duties as such executors as aforesaid;

And it further appearing that the said executors of the said John C. Kohlsaat, deceased, have caused to be filed in the office of the clerk of the said circuit court for the said southern district of New York a certified copy of the said letters testamentary pursuant to the provisions of section nine of the act of the Congress of the United States in such case made and provided, approved March 3rd, 1875; and we, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington,

together with this writ, so that you have the same at the said place, before the justices aforesaid, on the second Monday of October next, that the record and proceedings aforesaid being inspected the said justices of the Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this twenty-seventh day of February, in the year of our Lord one thousand eight hundred and seventy-seven, and of the Independence of the United States the one hundred and first.

JOHN I. DAVENPORT,
Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

Allowed Feb'y 29, 1877.

W'M J. WALLACE,
U. S. Dist. Judge.

4 (Indorsed:) Supreme Court United States. Charles W. Kohlsaat and John W. Kohlsaat, executors of the last will and testament of John C. Kohlsaat, pl'ffs in error, vs. Thomas C. Murphy, collector, &c., def't in error. Writ of error. E. & A. D. No. 3, p. 17. F. J. Fithian, pl'ffs' att'y.

Due service of the within writ is hereby acknowledged this day, Feb'y 27, 1877.

STEWART L. WOODFORD,
U. S. Att'y, for Def't.

Filed Feb'y 27, 1877.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, John I. Davenport, clerk of the circuit court of the United States for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify that the following pages, numbered from six to fifty-eight, inclusive, contains a true and complete transcript of the record and proceedings had in said court in the case of Charles W. Kohl-
5 saat and John W. Kohlsaat, executors of the last will and testament of John C. Kohlsaat, deceased, plaintiff in error, versus Thomas Murphy, defendant in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 4th day of October, in the year of our Lord one thousand eight hundred and seventy-seven, and of the Independence of the said United States the one hundred and second.

[SEAL.] JOHN I. DAVENPORT,
Clerk.

6 The people of the State of New York, by the grace of God free and independent, to all to whom these presents shall come or may concern, send greeting:

Know ye, that at the county of New York, on the twenty-second day

of March, in the year of our Lord one thousand eight hundred and seventy-six, before Stephen D. Van Schaick, surrogate of our said county, the last will and testament of John C. Kohlsaat, deceased, was proved, and is now approved and allowed by us; and the said John C. Kohlsaat, being at or immediately previous to his death an inhabitant of the county of New York, by means whereof the proving and registering said will, and the granting administration of all and singular the goods, chattels, and credits of the said testator, and also the auditing, allowing, and final discharging the account thereof doth belong unto us, the administration of all and singular the goods, chattels, and credits of the said deceased, and any way concerning his will, is granted unto John W. Kohlsaat and Charles W. Kohlsaat, both of the city of New York, executors in the said will named, they being first duly
7 sworn faithfully and honestly to discharge the duties of such executors.

In testimony whereof we have caused the seal of office of our said surrogate to be hereunto annexed.

Witness Stephen D. Van Schaick, surrogate of our said county, at the city of New York, the 22d day of March, in the year of our Lord one thousand eight hundred and seventy-six, and of our Independence the one hundredth.

[L. S.] S. D. VAN SCHAICKE,
Surrogate.

STATE AND COUNTY OF NEW YORK,
Surrogate's Office:

I, Peter V. Burtsell, clerk to the surrogate's court of said county, do hereby certify that I have compared the annexed copy of the letters testamentary granted under the will of John C. Kohlsaat, deceased, with the original record thereof, now remaining in this office, and have found the same to be a correct transcript therefrom, and of the whole of said original record.

In testimony whereof I have hereunto set my hand and affixed
8 the seal of office of said surrogate, this 5th day of April, in the year of our Lord one thousand eight hundred and seventy-six.

[NEW YORK SURROGATE'S SEAL.] PETER V. BURTSELL,
Clerk to the Surrogate's Court.

(Endorsed:) Letters testamentary granted to John W. Kohlsaat & Charles W. Kohlsaat, upon the goods, chattels, and credits of John C. Kohlsaat, deceased. Certified copy. E. & A. D. No. 3, p. 17. Filed Feb'y 27, 1877.

9 U. S. circuit court for the southern district of New York, in the second circuit.

Pleas before the judges of the circuit court of the United States of America for the southern district of New York, in the second circuit, at the United States court buildings in the city of New York, of the term of April, 1873, to wit, of the 22d day of April, in the year of our Lord one thousand eight hundred and seventy-three.

Witness the honorable Lewis B. Woodruff, one of the judges of the said circuit court.

KENNETH G. WHITE,
Clerk.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Be it remembered, that heretofore, to wit, on the 16th day of April, 1873, in April term of that year, before the judges of the circuit court of the United States of America for the southern district of New York, in the second circuit, at the United States court buildings in the city of New York, came John C. Kohlsaat, by F. J. Fithian, his attorney, and brought into the said court, before the aforesaid judges thereof, then there, their certain declaration against Thomas Murphy, being in custody, &c., of a plea of trespass on the case upon promises; which said declaration follows in these words, that is to say:

U. S. circuit court.

JOHN C. KOHLSAAT *vs.* THOMAS MURPHY. } No. 1.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

The above-named plaintiff comes here into court, and by F. J. Fithian, his attorney, suggest and give the court now here to understand and be informed that heretofore, to wit, on the 19th day of December last past, an action was commenced in the supreme court of the city of New York, according to the laws of the State of New York, and the rules and practice of said court in such case made and provided, in favor and in the name of the said plaintiff against the defendant herein, upon and for the same cause of action hereinafter set forth, and the summons therein was duly served upon the defendant herein in the said supreme court.

That the defendant afterwards, by his attorney, duly appeared in said action, and such proceedings were thereupon had that, afterwards, and on the 16th day of September, in the year of our Lord one thousand eight hundred and seventy-one, the said action was in due form of law removed by writ of certiorari for further prosecution and trial into this court, according to the act of Congress in such cases made and provided; and the clerk of the said supreme court did thereupon return the said writ, with the summons aforesaid, and did file the same in this court, according to the course and practice of this court, which allegations and suggestions the defendant does not deny, but admits the same to be true.

Wherefore, let the further proceedings and trial in this action against the defendant be continued in this court.

And the plaintiff accordingly, by their attorney aforesaid, complain of the defendant herein in a plea of trespass on the case, for that whereas the said defendant, on the 18th day of December, one thousand eight hundred and seventy, at the city of New York, in the southern district aforesaid, was indebted to the said plaintiff in the sum of one thousand eight hundred and sixty-one dollars, lawful money of the United States of America, for money before that time lent and advanced by the said plaintiff to the said defendant, and at the special instance and request of said defendant; and for other money by the said plaintiffs before that time paid, laid out, and expended for the said defendant, and at the request of the said defendant; and for other money by the said defendant before that time had and received to and for the use of the said plaintiff And being so indebted, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook, and then and there

faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the said sum of money in this count mentioned when the defendant should be thereunto afterwards requested.

And whereas, also, the said defendant afterwards, to wit, on the same day and year, and at the place aforesaid, accounted together with the said plaintiff of and concerning divers other sums of money
13 before that time due and owing from the said defendant to the said plaintiff, and then and there being in arrear and unpaid; and upon such accounting the said defendant then and there was found to be in arrear, and indebted to the said plaintiff in the further sum of one thousand eight hundred & sixty-one dollars of lawful money as aforesaid; and, being so found in arrear and indebted to the said plaintiff, the said defendant, in the consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the said sum of money last mentioned when the said defendant should be thereunto afterwards requested.

Nevertheless, the said defendant, although often requested, &c., has not yet paid the said several sums of money above mentioned, or any or either of them, or any part thereof, to the said plaintiff, but to pay the same, or any part thereof, to the said plaintiff, the said defendant has hitherto wholly refused, and still does refuse, to the damage of the said plaintiffs of two thousand dollars, and thereof the plaintiff bring suit, &c.

14 *Plea.*

United States circuit court, southern district of New York.

THOMAS MURPHY
ads.
JOHN C. KOHLSAAT.

And the said defendant, Thomas Murphy, by George Bliss, j'r, his attorney, comes and defends the wrong and injury, when, &c., and says that he did not undertake and promise, in manner and form as the plaintiff in this suit hath above thereof declared, against the said defendant, and of this he puts himself upon the country, and the said plaintiff doth the like, &c.

Therefore, the issue above joined is ordered by the said circuit court to be tried at the circuit court, to be held at the U. S. court building, in the city of New York, in and for the circuit and district aforesaid, on the third Monday of October, 1875.

And now at this day, to wit, on the third Monday of October, 1875, before the judges aforesaid, in the U. S. court building, in the city of New York, comes the said defendant, by George Bliss, his attor-
15 ney, and Nathaniel Shipman, district judge, before whom the said issue was tried, hath sent hither his record had before him in these words, to wit, that is to say:

Afterwards, that is to say, on the day and at the place within contained, before William D. Shipman, esquire, district judge, within named, according to the form of the statute in such case made and provided, come as well the within-named plaintiff as the within-named defendant, by their respective attorneys within named, and the jurors of the jury summoned to try the said issue, being called also come, who to speak the truth of the matters within contained, being chosen, tried,

and sworn, say upon their oath that the said defendant did not undertake and promise in manner and form as the said plaintiff hath within complained against him.

Therefore, it is considered that the said plaintiff take nothing by his said declaration, but that he be in mercy, &c., and the said defendant do go thereof without day, &c.

And it is further considered by the said court now here, that the said defendant do recover against the said plaintiff, forty-two $\frac{97}{100}$
16 dollars, for his costs and charges by him about his defence in this behalf laid out and expended, by the said court here adjudged to the said defendant and with his assent, according to the form of the statute in such case made and provided, and that said defendant have execution thereof, &c.

Judgment signed this 15 day of April, 1875.

R. E. STILWELL,
Dep. Clerk.

17 (Indorsed:) U. S. circuit court. Thomas Murphy ads. John C. Kohlsaat. Judgment record. George Bliss, attorney for defendant. Filed Apr. 16, 1875.

18 *Bill of exceptions.*

United States circuit court, city and State of New York.

JOHN C. KOHLSAAT, PL'FF,
vs.
THOMAS MURPHY, COLLECTOR, &C., DEF'T.

This action came on to be tried on the 17th day of December, A. D. 1874, at a trial term of the said court, held at the court-rooms thereof, at the city of New York, by and before the Hon. Nathaniel Shipman, one of the judges of said court, and a jury.

And thereupon the plaintiff, to make out and sustain the issues herein on his part, proved that at all times in the declaration herein mentioned and before the said plaintiff had been and was a merchant in the city & port of New York, engaged in the business of importing goods and merchandize from foreign countries into the port of New York for sale and consumption. And that at the time of the importations in question in the case the defendants was the duly-appointed and acting collector of the customs of the United States at and for the port of New York.

That heretofore, to wit, on the following dates and times, and by the following-named steamers, the said plaintiff imported from Bre-
19 men, Germany, to, and entered at, the said port of New York, for sale and consumption, seperate invoices and packages of merchandize, known and designated as "embroidered slipper-patterns," each parcel of the value, in the gold coin of the United States, following, viz:

By steamer Absynia, August 17, 1870; value, $950.
By steamer Italy, September 8, 1870; value, $2,575.
By steamer Selisia, October 18th, 1870; value, $877.
By steamer City of London, November 15, 1870; value, $1,255.
By steamer Erin, November 16, 1870; value, $1,160.
By steamer Wisconsin, November 22, 1870; value, $625.

That after such several entries of said several parcels of merchandize as aforesaid into said port of New York, and before the same were de-

livered to this plaintiff herein as the owner thereof, the same came to the custody and possession of the said defendant, as such collector of customs for the United States as aforesaid, and that thereupon, by color of the authority in him vested for that purpose, the said defendant caused to be assessed, liquidated, and collected customs or duties upon each of said parcels of merchandize so entered as aforesaid at and after the rate of thirty-five per cent. ad valorem on the same, amounting to the sums and amounts following, respectively, in the gold coin of the United States, on each entry, viz:

	On entry by Absynia	$332 50
20	On entry by Italy	$901 25
	On entry by Selisia	306 95
	On entry by City of London	439 25
	On entry by Erin	406 00
	On entry by Wisconsin	218 75
	Total	$2,604 70

That plaintiff was compelled to and did pay to said defendant, as such collector as aforesaid, the said several sums and amounts so assessed and levied as duties to the United States on the said several entries and parcels of merchandize as aforesaid; that at the time of the "liquidation of the amount" and payment by the plaintiff of each of said several sums above stated as and for duties on each of said several entries as aforesaid, he, said plaintiff, objected to and protested against the exaction of each of the said several sums, respectively, as such duties as aforesaid, on each of the said entries and importations; and then and there, in respect to each of said entries and importations, and on the liquidation and payment of each, the said plaintiff did separately and upon each entry make and deliver in writing to the said defendant, as such collector as aforesaid, a protest against the payment of said duty as follows, to wit:

21 *Form of protest.*

To Thomas Murphy, collector:

SIR: The undersigned hereby protest against the payment of 35 per cent. ad valorem duty charged and exacted by you, as collector of the port of New York, on certain goods, embroidered slippers patterns, imported by me in an entry made at the New York custom-house.

It is claimed by the undersigned that said goods should be held duty-free under section 23d of the act of Congress approved March 2d, 1861, entitled "An act to provide for the payment of outstanding Treasury notes, to authorize a loan, to regulate and fix the duties on imports, and for other purposes." Also, that if not made duty-free under the last-named statute, there should be assessed and levied upon such goods a duty of ten per centum ad valorem only, under the provisions of sec. six of the act of Congress approved July 14th, 1862, entitled "An act increasing temporarily the duties on imports, & for other purposes." But, on the contrary thereof, you have illegally & without authority of any statute assessed & enforced collection of a duty of thirty-five
22 per cent. ad valorem upon the said goods so as aforesaid entered.

Dated.

Yours, &c.,

JOHN C. KOHLSAAT,
Per F. J. FITHIAN, *Att'y*,
110 *Broadway, New York.*

That thereupon, and as to each of the said several entries and protests as aforesaid, and the decision of the said defendant thereon, said plaintiff did then and there, as to each separate entry of merchandize, at the time of each liquidation and protest as aforesaid, make and serve his separate appeal in writing to the Secretary of the Treasury of the United States from the several decisions of the said defendant, as such collector of customs as aforesaid, in exacting and levying said several amounts of duties as aforesaid, and upon the grounds and reasons stated in said protest.

That afterwards the said Secretary of the Treasury of the United States made his decision of and upon each of the said separate appeals so made to him as aforesaid, whereby he affirmed and approved of the decision and action of the defendant as such collector in each of said cases and as to each of the said entries & decisions aforesaid; which said several decisions of said Secretary of the Treasury upon and as to the said several appeals were of the dates following, to wit: Date
23 of decision on appeal as to entry by steamer Absynia, November 25, 1870. The same as to entry by steamer Italy, September 21, A. D. 1870. The same as to entry by steamer Selisia, Oct. 22d, A. D. 1870. The same as to entry by steamer City of London, November 19th, A. D. 1870. The same as to entry by steamer Erin, November 25th, A. D. 1870. The same as to entry by steamer Wisconsin, December 1, A. D. 1870.

And that thereupon afterwards, on the 19th day of said December, in said year, 1870, the plaintiff commenced this suit for the recovery of the said sums of money so claimed to have been illegally exacted as duties.

And farther to maintain the said issues on his part, the said plaintiff on said trial called as a witness JOHN W. KOHLSAAT, who, being duly sworn, tes'ifies as follows:

Q. Are you a son of the plaintiff in this case?

A. Yes, sir.

Q. State to the jury what the plaintiff's business is, and how long he has been engaged in that business in the city of New York.

A. He is an importer of fancy goods or fancy dry goods. He has been in the business for some 20-odd years.

Q. In this city?

A. In this city.

24 Q. How long have you had any knowledge of the business which your father has carried on?

A. Since 1862.

Q. In the year 1870 did your father import into this port certain goods by the steamers named in the paper which is now shown you?

A. Yes, sir.

Q. Were some of the goods imported by the steamer Abysinia?

A. Yes, sir.

Q. Look and see if the paper now shown you is the invoice of those goods?

A. Yes, sir.

Q. (Handing samples.) Will you state whether those are specimens of the goods referred to?

(Objected to.)

Q. (By the court.) Those are samples of the goods imported by these several steamers?

A. The same goods as are included in these invoices; goods named and specified in these invoices.

Q. (Handing sample.) Will you state what kind of an article that is?
A. A slipper-pattern.
Q. What is the manufacture of the body of it?
A. Cotton.
Q. What is the manufacture of the figure of it that makes it a slipper-pattern?
A. Part worsted and part silk; whatever they are composed of.
Q. Is the article imported in the form in which it is there?
A. Yes, sir.
25 Q. Do you know how the article is manufactured?
A. I do. I have seen it done.
Q. State how, as matter of fact, the work is put on.
A. The body of the article here, the stuff, is cut up in pieces suitable for making slippers; then it is given out and the embroidery is done on it—the work on it, that is, the shape as it is here.
Q. And, when completed in that form and shape, it is then imported into this country?
A. That is the form and shape in which it is imported.
Q. Goods of the form and shape in which goods were imported by that invoice?
A. Yes.
Q. In each case?
A. In every case.
Q. Look on that paper and tell me whether that is a correct statement of the amount of duties paid on each of these entries.
A. Yes, sir; on the several items here.
Q. A correct statement of the whole amount of duties?
A. Yes, sir.
Q. Does it also contain a statement of the amount of duties at the rate of 10 per cent. ad valorem on each item?
A. Yes, sir; it does.

Cross-examined:

Q. Are these samples, which for matter of convenience we will call samples A, taken out of any of the packages of the goods the marks of which you have given?
26 A. No, sir; they are not taken out of those packages.
Q. Is sample B, that I now show you, taken out from any of those?
A. Not that I am aware of; I have not taken it out.
Q. Is it from your establishment?
A. Not brought here by me. It has not our mark on it.
Q. You are sure that all the goods whose marks and numbers you have now given are precisely like those, except it may be in the figure of the embroidery.
A. Yes; they may be a different style, but the same class of goods.
Q. The same class of goods, except as they may differ in the figure and kind of embroidery?
A. Yes, sir.
Q. Its ground is canvass, is it not?
A. Yes, sir.
Q. So known in trade, is it not?
A. Yes, sir; that is, it has several names, you may say—whatever word you like to use.
Q. Different kinds of canvass have different kinds of names, I suppose, you mean to say?

A. Yes; it is a twist-thread; it is cloth.

Q. There are such things as Java canvass, are there not—a different article?

A. Yes, sir.

Q. There are different kinds of canvass, are there not?

A. Yes, sir; they call it a stuff—Java stuff or waffel stuff.

Q. But the general commercial name and proper name of this article is canvass?

A. Yes, sir.

27 Q. Is it mohair cloth?

A. No, sir, it is not; it is a twist.

Q. (Handing sample.) What do you call that?

A. I call that a slipper-pattern.

Q. Is that made of cloth?

A. The body is; yes, sir.

Q. The raised figures are embroidered, are they not?

A. No, sir; only partly. There is no embroidery whatever; it is a stitching.

Q. The figures upon samples A and D, which you have seen, are embroidered, are they not?

A. They are.

Q. By hand or by machinery?

A. By hand, not by loom; not woven in the texture; it is put on afterwards.

Q. Look at sample C, and tell me whether that is made expressly for slippers?

A. Well, you may say it is, and you may say it is not.

Q. Generally?

A. No; it is not marked off as other slippers are—as the goods we claim are. This can be used for other purposes.

Q. What other purposes, as a marketable commodity, is that thing bought and sold for?

A. It can be cut out.

Q. I don't ask you what can be done. As a marketable commodity, what is it bought and sold for?

A. It is bought and sold for slippers, but not cut especially for that purpose, as the embroidery is not connected as it is on what we claim.

Q. I show you sample D, and ask you what that is.

28 A. That I should call a slipper-pattern, sir.

Q. What is that ordinarily bought and sold for?

A. As a printed or woven slipper-pattern.

Q. For what use is it bought and sold?

A. Slipper-patterns.

Q. To be used for making slippers?

A. Yes, sir.

Q. Anything else?

A. Not that I am aware of in this country; I suppose it can be.

Q. It is quite a different article from this, is it not, sir?

A. I think it is, sir.

Q. What is sample E?

A. That I should call a piece of carpet. I am not posted in that article. It appears to be cut off the border of a carpet; whether it is Brussels or Axminister, I cannot say.

Q. This canvass is made of what kind of material?

A. Cotton, sir.

Q. This embroidery is made of what kind of material?

A. That one, I think, is all worsted; they come worsted, and silk and worsted, mixed they vary.

Redirect:

Q. Referring to samples A and B, you said that they were canvass. I will ask you if all canvass is cloth.

A. All canvass is cloth, or what you can call a stuff.

Q. It is a manufacture of cloth of some kind?

A. Yes, sir.

29 Q. Cotton or linen cloth, or worsted cloth, or whatever the material, it is a manufacture of cloth?

A. Yes, sir; the closer the thread is, the more body it has, the more it resembles cloth.

Q. Although you stated that it was canvass, yet, nevertheless —

(Objected to.)

Q. Is it not a manufacture of cloth of some kind?

(Objected to as leading.)

Q. States whether or not that is a manufacture of cloth of some kind.

(Same objection.)

Q. Is there anything known in trade and commerce as a manufacture of cloth?

(Objected to.

Pl'ffs' counsel proposes to show that this is a manufacture of cloth, cut in strips or patterns of the size and shape of shoes and slippers.

Objected to as inadmissible under the protests and bill of particulars.)

By the court:

Q. How is it made; do you know?

A. It is woven.

Q. I mean this thing—the body of it.

A. Woven, thrown t'rough, the same as any cloth is. Instead of being woven tight it is woven loose, so that the needle can pass through it. But we have different kinds of canvass. They come in as heavy texture as any cloth is made. It is merely the fineness or coarse-

30 ness of the cloth or stuff. It is woven and thrown through with the shuttle, the same as any other cloth. It comes in different numbers, sometimes so very fine that you can hardly see the spaces, and sometimes so wide that you can almost put your finger through.

Recross:

Q. I show you sample E. Is not that a piece of Java canvass?

A. So called by part of the trade.

Q. Do you deal in it?

A. I do, sir. It is sometimes called Java stuff by the manufacturers.

Q. In the trade, however, the ordinary name by which it is bought, sold, and dealt in is Java canvass?

A. Both Java stuff and Java canvass.

Q. You entered these goods correctly?

A. I think we did.

Q. Are you familiar with the use of the term cloth in trade and commerce?

A. I am, so far as our trade goes, and a little outside, but I don't pretend to be an expert.

Q. Does the term "cloth" in trade and commerce, so far as your experience goes, mean anything different than it does to ordinary mortals who are not in trade and commerce?

A. As far as my experience goes, if my own experience amounts to anything, I would say yes; it refers to these things, too.

Q. That is not the question I asked you. I asked you whether the term "cloth" as used in trade and commerce means—generally
31 means—anything different from what it does as used by people not in trade and commerce.

A. That I cannot answer. I cannot know what the ideas of other people are. If you ask me my opinion, I would say yes.

Q. I ask you, as the result of your observation and experience, what is the fact about that?

A. The fact that the trade call this stuff, too.

Q. I don't ask you about this stuff. Have you heard the term cloth used in trade and commerce?

A. I have, sir.

Q. Have you heard it used by people not in trade and commerce?

A. Well, I suppose I have. I cannot certify to that positively. I think they are all in—well, some of them may have been out of trade. I don't know whether their opinions would be what you wanted.

Q. Haven't you heard the term cloth used in the family?

A. I have, sir.

Q. Does it mean anything different in ordinary use than it does in trade and commerce?

A. It does. It depends upon what material it is made of. Then you must give a special name to it.

Q. When you, therefore, speak of cloth, as I understand you, you don't know what particular article you mean without some further identification?

A. No, unless you say cotton, silk, or worsted, or whatever you put it.

32 Q. Different cloths of different textures have different names, have they not?

A. Yes, sir.

Q. Don't you know that these names have nothing to do with the texture?

A. I cannot say whether they have or not.

Q. When you see the term "cloths" used in trade and commerce, in the plural, what kind of goods does it ordinarily refer to?

A. It depends on the material of which it is composed—cotton, wool, or silk, or whatever it may be.

Q. When you speak of the term "cloths" in the trade, do you mean silks?

A. We have silk cloths, too; it would depend entirely upon what question would be asked.

Q. You don't mean silks, then; you mean a silk cloth?

A. A silk cloth.

Q. What is the name of the silk cloth?

A. I could not tell; I suppose there are different grades.

Q. Is all canvass cloth?

A. I call it so. If you take a canvass tent, or something of that kind, I call that canvass; and sail-cloth I call canvass. There are different kinds of canvass.

Q. When I asked you if canvass was not the ordinary and proper name for this article, you answered that it was; do you mean to change your testimony in that respect?

A. I do not. As I said at the time, it depends upon where the ques-

tion is asked, and who asks it; it is called cloth, stuff, or canvass, as the case may be.

33 Q. When these questions are asked it depends very much upon where they are asked and who asks them?

A. Yes, sir.

Q. I want to know, as matter of fact, whether the ordinary and proper name in trade and commerce of this particular article (I refer, now, to the buyer and not the importer) is or is not canvass?

A. It is not; it is stuff.

By M'r Fithian:

Q. State whether or not, in the commercial sense or in the common acceptation of the term, as far as you know, canvass is or is not a species of cloth?

A. It is a species of cloth.

Q. So of most frabrics, that of silk, while you would call it a silk, yet state whether or not, in the common acceptation of the term and in the mercantile sense of the term, it is not also considered a manufacture of cloth—silk cloth, or a manufacture of cloth?

A. It is; it may be called cloth as well as silk.

(Objected to; admitted; exception.)

Q. The material of which the fabric is made characterizes the kind of cloth it is; is not that it?

A. Yes, sir, that is the thing.

By M'r Tremain:

Q. This is cotton cloth, isn't it?

A. Yes, sir.

Q. Is not the commercial distinction between what is known as canvass and what is known as cloth generally in the size of the perforations?

34 A. No, sir.

Q. When it is very close is it ever called canvass?

A. Yes, sir.

Q. What is the name of the article then?

A. It depends upon what article you refer to. There are a great many articles you can call canvass. There is a paper called a canvass.

Q. (By M'r Fithian.) Will you state whether after the passage of the act of 1861, and before the passage of the act of 1862, how these goods were charged?

(Objected to as hearsay. Question withdrawn.)

Plaintiff rests.

GRANVILLE CARTER, called by def't, being duly sworn, testifies as follows:

Q. Are you in the appraiser's office now?

A. Yes, sir.

Q. How long have you been familiar with dry goods?

A. All my life-time.

Q. Have you had experience and been familiar with goods similar to that which is now shown you?

A. I have, the last 10 years.

Q. Have you seen those goods in trade and commerce for many years past?

A. Yes, sir.

Q. What is the name under which goods like those (samples F) are ordinarily bought and sold in trade and commerce?

A. Canvass.

Cross-examined:

35 Q. Is this canvass a species of cloth, a kind of cloth?

(Objected to; admitted; exception taken.)

A. I should say it was.

Q. It is a manufacture of cotton cloth, isn't it, called canvass, just as the sail of a ship is another manufacture of cotton cloth?

A. It is all made of cotton or linen.

Q. Is there any difference between this and the sail of a ship except that this is more open woven?

A. No difference except that this is a rather looser texture.

Q. Each of them are manufactures of cotton?

A. Yes, sir.

Q. I show you plaintiff's sample G; what do you call that article?

A. Worsted embroidery.

Q. That is not a slipper-pattern, is it?

A. No, sir.

Q. Not cut nor woven for a slipper-pattern?

A. No, sir; it could not be used for a slipper-pattern.

Q. That, then, is an article called worsted embroidery?

A. Yes, sir.

Q. Is the term cloth, as a general thing, applyed to this article in trade and commerce?

A. No, sir; it is always called canvass of the different kinds, whether Java or Penelope; it all comes as canvass.

Q. This is known as Penelope?

A. Yes, sir; that is.

Q. Sample A?

36 A. The same; the only difference is the figures are closer.

Q. (By M'r Fithian.) What is that article composed of (sample D)?

A. This is cotton and worsted.

Defendant rests.

Testimony closed.

Def't's counsel asks the court to direct the jury to find a verdict for the defendant; motion denied; exception taken.

And thereupon, the attorneys for the respective parties having rested the case, and the proofs on both sides being closed, the attorney for the plaintiff made the following prayers, and requests to the court to decide, charge, and rule as follows:

1st. That upon all the proofs in the case, the plaintiff is entitled to a verdict and judgment for the full amount of the duties proved to have been paid upon the merchandize proved to have been imported by the plaintiff in this case, upon the ground that such merchandize was not liable to duty under any law of the United States, and to order & direct a virdict for the plaintiff for such amount or at least for the amount

37 claimed in the bill of particulars in that regard, to wit, the amount of 25 per cent. ad valorem.

But the said judge refused so to determine & decide, to which refusal the counsel for the plaintiff then & there excepted.

The counsel for the plaintiff further then & there requested said judge to rule and determine:

2d. That the merchandize proved to have been imported by the plaintiff upon the undisputed proofs in the case, was and is manufacturers of cloth cut in slips and patterns of the size and shape for slip-

pers exclusively and not combined with India rubber, and was therefore exempt from duty under and by virtue of the provisions of section 23 of the act of Congress entitled "An act to provide increased revenue from imports, to pay interest on public debt, and for other purposes," approved March 2d, 1861, &c.

But the said judge refused so to determine & decide, to which refusal the counsel for the plaintiff then and there excepted.

And the counsel for the said plaintiff then requested the said judge to submit the matter to the jury to find as a fact:

3d. Whether or not the merchandize so imported by the plaintiff was manufactures of cloth cut in strips and patterns of the size and
38 shape for slippers exclusively, and not combined with India rubber, with instructions that if they shall so find they shall render a verdict for the plaintiff for the amount of duties proved to have been paid in this case, or at least for the amount claimed in the plaintiff's bill of particulars herein.

But the said judge refused said request & instruction, and to which refusal to submit & refusal to instruct the counsel for the plaintiff then & there separately excepted.

And the counsel for the plaintiff then and there further requested the said judge to direct the jury to render a verdict for the plaintiff for such sum as the plaintiff may be entitled to recover herein for whatever amount of duties that appear from the proofs to have been exacted from plaintiff by defendant and to which the plaintiff may be entitled under his pleadings and bill of particulars.

But the said judge refused so to decide & direct, to which refusal the counsel for the plaintiff then & there excepted.

And thereupon the said judge did charge and decide as follows:

GENTLEMEN OF THE JURY: The goods which were imported by
39 the plaintiff were the ordinary slipper-patterns made of cotton canvass, cut into strips of the size and shape for slippers, and somewhat embroidered with worsted and silk. The interstices of the canvass were to be filled by the purchasers with worsted or with silk, in accordance with the embroidered design upon the patterns, and a sole was thereafter to be made, when the slipper would be completed and ready for use.

The 23d section of the tariff act of 1861 provided that lastings, mohair cloth, silk twist, or other manufacture of cloth cut in strips or patterns of the size and shape for shoes, slippers, boots, bootees, gaiters, and buttons, exclusively, not combined with India rubber, should be free from duty. The act of 1862 provided that the same manufactures, woven or made in patterns of such size, shape, or form, or cut in such manner as to be fit for slippers, &c., should be dutiable at 10 per cent. ad valorem. This clause was re enacted in the same terms in the act of June 30th, 1864, and the provisions of the act of 1864 were repealed by joint resolution of Congress, approved March 2d, 1867.

The plaintiff claims that the articles which he imported were directly within the terms of the 23d section of the acts of 1861; that the
40 joint resolution of March 2d, 1867, expressly repealing the provisions of the act of 1864 in regard to slipper-patterns, repealed also the provisions of the act of 1862, which, as I have said, was in precisely the same terms of the clause which was expressly repealed, and revived the clause of the act of 1861, whereby the goods were made free of duty. The defendant claims that the goods were dutiable under the section of the act of 1862, which provided that the manufactures

of cotton, if embroidered or tamboured in the loom or otherwise * * * * or by hand, * * * * * should be dutiable at 35 per cent. That if this position is not correct, that the tariff act of June 30th, 1864, was a general tariff act, intended as a substitute for former acts, whereby new principles for the assessment of duties were enacted, and that a repeal of a particular provision of the act of 1864 did not revive former legislation upon the article which was specified in the repealing clause, but left such article to be embraced within such other parts of the act of 1864, or such provisions of the tariff act of March 2d, 1867, amendatory of the act of 1864, as should be applicable, assuming that the
41 goods which were imported by the plaintiff were included within the slipper-pattern clause of the act of 1864, and that at the time when the act went into effect these goods were dutiable at 10 per cent. ad valorem. I am of the opinion that the decision of Judges Clifford & Lowell, in the case of Butler vs. Russell (11 Int. Rev. Record, page 30), upon the effect of the repeal of that clause by the resolution of March 20, 1867, is one which should govern the decision of the present case.

The goods which were the subject of controversy in Butler v. Russell were worsted goods woven and made in patterns for slippers by the piece and not cut prior to importation. The claim of the plaintiff was that they were dutiable at 10 per cent. under the act of 1863, while the defendant contended that the effect of the repealing resolution was not to revive any prior legislation on the subject.

The principles which were there announced are equally applicable to the case now before the court. If the goods which were the subject of controversy in the case of Butler v. Russell were not dutiable under the acts of 1861 or 1862, but were dutiable under such provisions of
42 the act of 1864, as well as applicable to worsted goods, upon the ground that the intent of Congress by this act was to establish new classifications and principles of tariff legislation, then it equally follows that this court is also to look exclusively to the act of 1864, and its amendments, in determining the rate of duty which should be imposed upon the goods which were imported by the plaintiff in this suit.

It is true that the decisions in another circuit are not controlling upon this court, but it must be noticed that the tendency of the opinion of the supreme court in the case of Smythe v. Fisk, which has been recently decided, is in favor of the construction of the act of 1864 which was adopted by M'r Justice Clifford in Butler v. Russell, and imparts to his views additional authority.

It then follows that if the goods were originally embraced in the slipper-pattern clause, they are now dutiable at 35 per cent. under the clause of the act of 1864 which imposes upon all manufacturers of cotton, not otherwise provided for, a duty of 35 per cent. ad valorem.

The jury will render a verdict for the defendant.

43 And the counsel for said plaintiff did then & there, specifically & separately, except to the following parts & portions of the said charge & each thereof, viz:

1st. The plaintiff's counsel excepted to all that portion of said charge which holds & declares that the act of the Congress of the United States, entitled "An act to increase duties on imports, & for other purposes," approved June 30th, 1864, was or is in any manner a repeal or modification of the provisions of the previous acts of the Congress, entitled "An act to provide for the payment of outstanding treasury notes, to authorize a loan, to regulate & fix the duties on imports, & for other purposes," approved March 13, 1861; and an act entitled "An act increasing temporarily the duties on imports, & for other purposes,"

approved July 16, 1862, except as to such matters in such last-named acts as are in direct conflict with the provisions of the said act of 1864.

2d. The plaintiff's counsel also excepted, as aforesaid, to that part of said charge which holds and decides that the goods and merchandize in question in this case were dutiable thirty-five per cent. ad valorem, under the clause of the said aforementioned act of 1864 which imposes upon all manufactures of cotton, not otherwise provided for, a
44 duty of thirty-five per cent. ad valorem.

3d. The plaintiff's counsel also then & there excepted to the decision and order of said judge directing the jury to render a verdict for the defendant. And thereupon the said jury, under and pursuant to said direction, rendered a verdict for the defendant; and because none of the said facts, evidence, requests, rulings, decisions, and exceptions appear upon the record of the said trial, the attorney and counsel for said plaintiff has tendered, and the said judge, upon the prayer of the said attorney, has settled and signed this bill of exceptions the 26th day of January, A. D. 1876.

[L. S.] N. SHIPMAN,
Judge.

The foregoing bill of exceptions is agreed upon by the attorneys for the respective parties, & time is given for the same to be signed and filed until the said judge shall be conveniently accessible.

Oct. 4th, 1875.

GEORGE BLISS,
U. S. Att'y.
F. J. FITHIAN,
Pl'ff's Att'y.

45 (Indorsed:) Circuit court of the U. S. John C. Kohlsaat ag'st Thomas Murphy, collector, &c. Bill of exceptions. Filed March 1st, 1876.

46 Circuit court of the United States for the southern district of New York, in the second circuit.

JOHN W. KOHLSAAT AND CHARLES W. KOHLsaat, executors, &c., of the last will, &c., of John C. Kohlsaat, dec'd, pl'ffs in error,
vs.
THOMAS MURPHY, COLLECTOR, &C., DEF'T IN error.

Know all men by these presents that we, Freeman J. Fithian, of No 345 West 34 street, New York City, and Lemuel B. Clark, of 86th street, in said city, are held and firmly bound unto the above-named Thomas Murphy in the sum of two hundred dollars, lawful money of the United States, to be paid to the said Thomas Murphy, for the payment of which, well and truly to be made, we bind ourselves and each of us, and our and each of our heirs, executors, and administrators,
47 jointly and severally and firmly, by these presents. Sealed with our seals, and dated this day of February, in the year of our Lord one thousand eight hundred and seventy-seven; whereas the above-named John W. Kohlsaat and Charles W. Kohlsaat, as executors as aforesaid of the last will and testament of the said John C. Kohlsaat, deceased, have prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in a suit wherein the

said John C. Kohlsaat, deceased, was plaintiff, and the above-named Thomas Murphy was defendant, by the judge of the circuit court of the United States for the southern district of New York in the second circuit.

Now, therefore, the condition of this obligation is such that if the above-named John W. Kohlsaat and Charles W. Kohlsaat, as such executors as aforesaid, shall prosecute their said writ of error to effect and answer all damages and costs if they fail to make their plea good,
48 then this obligation to be void; otherwise, to remain in full force and virtue.

F. J. FITHIAN.
L. B. CLARK.

Sealed and delivered, taken and acknowledged, this 27th day of April, A. D. 1876, before me.

W'M J. WALLACE.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

Freeman J. Fithian and Lemuel B. Clark, being duly sworn, each deposes and says that he is worth the sum of two hundred dollars over and above all his just debts and liabilities.

F. J. FITHIAN.
L. B. CLARK.

Sworn this 27 day 'f February, A. D. 1876.

W. J. WALLACE,
United States District Judge.

(Endorsed:) U. S. circuit court, southern district of New York. John W. Kohlsaat and another, executors, &c., pl'ffs in error, vs. Thomas Murphy, def't in error. Bond for costs and damages. F. J.
49 Fithian, atty's for pl'ffs in error.

The form, amount, and sufficiency of within bond is approved, Feb'y 27th, 1877.

W'M J. WALLACE.

Filed Feb'y 27, 1877.

50 *Assignment of errors.*

In the Supreme Court of the United States.

JOHN W. KOHLSAAT AND CHARLES W. KOHLsaat, executors, &c., of the last will, &c., of John C. Kohlsaat, deceased, plaintiffs in error,
ag'st
THOMAS MURPHY, COLLECTOR, &C., DEFENDants in error.

Afterwards, to wit, on the second Monday of October, 1877, before the justices of the Supreme Court of the United States, at the city of Washington, came the aforesaid plaintiffs in error, by their attorney aforesaid, and say in the records and proceedings aforesaid, and also in giving the judgment aforesaid, there is a manifest error in this, to wit, that the court denied the motion of the plaintiffs' counsel to direct the jury to find the verdict for the plaintiff. Whereas, according to the law of the land and the testimony, the court should have directed a verdict for the plaintiff.

51 And also, that the court refused the request of the counsel for the plaintiff to decide and determine that, upon the undisputed proofs in the case, the merchandize in question was manufactures of cloth cut in slips and patterns of the size and shape for slippers exclusively, and not combined with India rubber, and was, therefore, exempt from duty under the laws of the United States. Whereas, according to the laws of the land and the testimony, the court should have granted such request.

Also, that the court refused the request of the plaintiffs' counsel to submit to the jury the question of facts I thirdly stated in the bill of exceptions, whether or not the merchandize so imported by the plaintiff was manufactures of cloth cut in strips and patterns of the size and shape for slippers exclusively, and not combined with India rubber, with instructions that if they do so find they shall render a verdict for the plaintiff for the amount of the duties exacted. Whereas, according to the law of the land and the testimony, the court should have
52 granted such request.

And also, that the judge charged the jury that the act of Congress of the United States, entitled an act to increase duties on imports, and for other purposes, approved June 30th, 1864, was a repeal or modification of the provisions of the previous acts of Congress, entitled "An act to provide for the payment of outstanding Treasury notes; to authorize a loan; to regulate and fix the duties on imports, and for other purposes," approved March 13th, 1861, and an act entitled "An act increasing temporarily the duties on imports, and for other purposes," approved July 16th, 1862, except as to such matters in such last-named acts as are in direct conflict with the provisions of said act of 1864. Whereas the said judge should have decided the contrary.

And also, that the said court charged the jury and decided that the goods and merchandize in question in this case were subject to duty at the rate of 35 per cent. ad valorem under the clause of the aforesaid-mentioned act of Congress of 1864, which imposes a duty of
53 that amount upon all other manufactures of cotton not therein otherwise provided for. Whereas the said court should have charged and decided that the said merchandize in question in this case were not subject to any duty whatever under said act, or, if any, not to exceed the amount of ten per cent. ad valorem; and also, other errors upon said errors appearing.

F. J. FITHIAN,
Att'y for Pl'ff and App't, 113 *B'way, N Y.*

(Endorsed:) Supreme Court of the United States. John W. Kohlsaat and Charles W. Kohlsaat, executors, &c., of the last will, &c., of John C. Kohlsaat, dec's'd, pl'ffs in error, ag'st Thomas Murphy, collector, &c., def'*ts* in error. Assignment of errors. F. J. Fithian, att'y for pl'ffs and app'ts, 133 B'way, N. Y. U. S. circuit court. Filed Jul. 24, 1877. John I. Davenport, clerk.

54 *Joinder in error.*

Supreme Court of the United States.

JOHN C. KOHLSAAT ET AL., PLAINTIFFS IN error,
vs.
THOMAS MURPHY, DEFENDANT IN ERROR.

And afterwards, to wit, on the second Monday of October, 1877, the

said Thomas Murphy, defendant in error, by Stewart L. Woodford, his attorney, comes here into court and says that there is no error, either in the record or proceedings aforesaid or in the giving of the judgment aforesaid.

And he prays that the said Supreme Court, before the justices thereof now here, may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid above assigned for error, and that the judgment aforesaid, in form aforesaid given, may be in all things affirmed, &c.

STEWART L. WOODFORD, *J.*,
Attorney for Defendant in Error.

(Endorsed:) U. S. Supreme Court. John C. Kohlsaat et al.,
55 pl'ffs in error, vs. Thomas Murphy, def't in error. Joinder in error.

Due service of a copy of within joinder is hereby admitted, this 29th day of Sept., 1877.

F. J. FITHIAN.

U. S. circuit court. Filed Oct. 1, 1877.
JOHN I. DAVENPORT, *Clerk.*

56 Circuit court of the United States, southern district of New York.

JOHN W. KOHLSAAT AND CHARLES W. KOHLsaat, executors, &c., of the last will, &c., of John C. Kohlsaat, dec'sd, pl'ffs in error,
vs.
THOMAS MURPHY, COLLECTOR, &C., DEF'T IN error.

By the honorable William Wallace, judge of the circuit court of the United States for the southern district of New York, to the above-named Thomas Murphy, defendant:

Whereas the above-named John W. Kohlsaat & Charles W. Kohlsaat, as executors as aforesaid, have lately brought a writ of error to the Supreme Court of the United States from a judgment lately rendered in the circuit court of the United States for the southern district of New York, in the second circuit, in favor of the said Thomas Murphy against the said John C. Kohlsaat, deceased, for the sum of forty-two dol-
57 lars and ninety-seven cents, costs of suit, and have filed said writ of error with the clerk of said circuit court, and have also given and filed the security required by law for the prosecution of said writ of error to effect and answer all damages and costs if they fail to make their plea good.

You are therefore hereby cited to appear before the said Supreme Court of the United States, at the city of Washington, on the second Monday of October next, the return day of said writ of error in the October term of said court, to do and receive what may appertain to justice in the premises.

Given under my hand at the city of New York, in the southern district of New York, in the second circuit, the 27th day of February, 1877, and of the Independence of the United States the one hundredth & first.

W'M J. WALLACE.

58 (Indorsed:) United States circuit court. John W. Kohlsatt and another, executors, &c., pl'ffs in error, vs. Thomas Murphy, def't in error. Citation. F. J. Fithian, att'y for pl'ffs in error. E. & A. D. No. 3, p. 17.

Due service ack'g'd, Feb'y 27, 1877.

STEWART L. WOODFORD,
J. U. S. Att'y, for Def't.

Filed Feb'y 27, 1877.

(Indorsement on cover:) No. 832. John W. Kohlsaat and Charles W. Kohlsaat, executors of John C. Kohlsaat, deceased, pl'ffs in error, vs. Thomas Murphy, late collector of the port of New York. S. New York C. C. U. S. Filed 8th October, 1877.

REC. 832—3

S. Hamilton's Son, Printer, 61 Cedar St., N. Y.

United States Supreme Court.

John W. and Charles W. Kohlsaat, Executors, &c., of John C. Kohlsaat, deceased,

Plaintiffs in Error,

vs.

Thomas Murphy, Late Collector, &c.,

Defendant in Error,

BRIEF AND POINTS FOR PLAINTIFFS IN ERROR.

This is a writ of error to the Circuit Court of the United States for the Southern District of New York, to review certain rulings and decisions of that Court, on the trial of an action to recover of defendant the amount of certain duties alleged to have been illegally assessed and collected by him as collector of the port of New of York, upon certain merchandise imported by plaintiff 's testator.

The case was tried December 17, 1874, by and before Hon. Nathaniel Shipman, and a jury, at the Court in New York.

FACTS.

In the Autum of 1870, between the 1st days of August and December, the plaintiffs' testator, a merchant at New York, imported from Breman, Germany, to said port of New York, by several steamers, six several invoices of merchandise, known and desigated as "*Embroidered Slipper Patterns*" of the appraised value in all of $7,442, in the gold coin of the United States, upon which several invoices and goods the defendant caused to be levied and callected a duty of thirty-five per cent. ad valorem, amounting in all to the sum of $2,604.70 in gold. The importer, by his written protest, protested against this exaction, on the ground that this merchandise was exempt from duty by virtue of the express provisions of the Tariff Act of March 2d, 1861 (12th Statutes at Large, page 178, Sec. 23), or if not, and the goods were subject to any duty, it was a duty of ten per cent. ad valorem only, by virtue of the express provisions of the Tariff Act of July 14, 1862 (12th Statutes at Large, 543, Sec. 6). Appeals from this action of the Collector were duly taken to the Secretary of the Treasury, within the time required by statute, which appeals were decided by the Secretary, sustaining and approving the action of the Collector. And thereupon, within the time prescribedby law, this action was commenced (see Error Book, fols. 18 to 24).

It was proved on the trial, and no evidence to the contrary offered, that the merchandise in question was a "manufacture of cotton cloth," woven loose or open, suitable for being afterwards embroidered, and then "*cut in patterns*," of such "size," "shape," "form" and "manner" "as to be fit for *shoes* or

slippers exclusively," and was not, in any manner, "combined with india rubber." And that after being so cut in such patterns, shape and form, they were embroidered by hand with figures, more or less, and with a material of *silk* or *worsted* yarn, or sometimes both combined. And when so manufactured, cut and embroidered they were imported to this country and known in the trade as "embroidered slipper patterns," or a "slipper pattern" with embroidery, and used and sold solely for the manufacture of "shoes" or "slippers" (see evidence of Kohlsaat, Error Book, fols. 24 to 30, 33, 34).

On the examination of that witness various samples of merchandise similar in general character, but differing in form, material and make from the plaintiffs' goods, were produced to the witness, and he was cross-examined in reference to them by the counsel for the defendant in error for the purpose of testing the correctness of his definitions, &c., that is to say, he was shown *worsted* goods, "mohair cloth, some with embroidery *stamped or printed* on and some woven on, some cut in form of slippers and some not. And he was examined as to these samples. It *may* therefore be important that the Court should take care that these other samples are not confounded with our goods.

We claim the goods in question were exempt altogether, or, if not, were subject only to a duty of *ten per cent.*, ad valorem. The prayers for rulings and the exceptions to the, charge and decisions of the Court below, are, it is supposed, sufficiently broad to cover all the grounds of our claim.

The Tariff Act, approved March 2d, 1861, entitled (in part) "An Act to regulate and fix the duties on imports and for other purposes," (12 Statutes at large, 178), provided, first, that "*in lieu*" of duties theretofore imposed by law on the articles thereinafter mentioned, and on such as might be

then "exempt from duty," there should be levied and collected on the goods and merchandise "therein enumerated and provided for," the rates of duty thereinafter specified. And thereupon the Act proceeded to impose various rates and amounts of duty upon nearly or quite all merchandise imported from foreign cuntries.

It imposed a duty of twelve cents per pound, and twenty-five per cent. ad valorem " on woolen cloths," and all manufactures of wool of every description, made wholly or in part of wool "*not otherwise provided for*;" also on bunting, "stained," &c., and on all other manufactures of wool, or of which wool shall be a component material, *not otherwise provided for*, a duty of thirty per cent. ad valorem, (sec. 13, sub-divisions 2 and 3).

Also on "all manufactures of cotton, &c., if printed, painted, colored or stained " a certain duty per square yard, and ten per cent. in addition ; and also, "thirty per cent ad valorem " on "all cotton goods " not iucluded in above, costing more than sixteen cents per square yard, and the same duty on "shirts, drawers," &c. and "other manufactures of cotton, bleached, unbleached or printed, *not otherwise provided for*," (sec 14, sub. 1st and 3d).

Also a duty of from fifteen to thirty per centum on all silks, "twists," braids, &c., (sec. 16).

Also a duty of twenty-five per centum on "hair cloth " and "hair sortings," and all other manufactures of hair "*not otherwise provided for*," (sec. 21, clause 1.

Also a duty of *thirty per centum* on a great variety of articles enumerated in sec. 22. Among which are included "manufactures *not otherwise* "*provided for*," composed of mixed materials, in " part of cotton, silk, wool, worsted or flax." "Man- " ufactures of cotton, silk, wool or worsted, if *em-* " *broidered* or *tamboured* in the loom, or otherwise

" by machinery, or with the needle, or other pro-
" cess, *not otherwise provided for*," (sec. 22, letter M.)

Now it is clear that if the goods in question in this case, (embroidered cotton slipper patterns), were not specifically "*otherwise provided for*," in the statute they, would be by this acts, subjected to duty, under some one of the above provisions. Probably either the cotton clauses or the one last above.

But, in and by sec. 23 of the act, a great variety of articles which would otherwise be subject to duty under the general provisions of the act, are wholly exempted and declared free of duty and among which are

" Lastings, mohair cloth, silk twist or other
" manufactures of cloth, *cut in strips or patterns*,
" *of the size and shape for shoes, slippers, boots*,
" *bootees, gaiters and buttons, exclusively not com*,
" *bined with india rubber*."

Which description clearly includes the "slipper patterns," in controversy in this case, and "*provides otherwise*" for them than in the general provisions of the act, and we say therefore:

FIRST.

The above provision does, and clearly indicates the intent of Congress, to separate the articles named in the above quoted paragraph, when *cut in the form, size and shape, and for the use above specified*. From the mass of merchandise of like material and texture, in the act, subject to duty, and classify, and deal with them separately, (otherwise provide for them), with reference, solely, to *the use and purpose* for which they are designed. That is to say, the Legislative body declare in sub-

stance and effect, that although they have in general and comprehensive terms, imposed duties upon every article of foreign manufacture or material within which, "*lastings, mohair cloth, silk, twist, and any and every other manufacture of cloth*, imported into this country, would be included. Yet we intend, and do hereby, nevertheless, exempt from such duty any and every part or portion of such manufactures, as may be imported in the *form and size*, and intended *solely* for the *use* above specified.

SECOND.

It follows, therefore, that these articles among which our goods are included, having been thus separated and classified and dealt with in reference to a particular *use* to which they are adapted, cannot thereafter, so long as such separate use and classification continues, be included or taxed under any general provision or classification of merchandise of the same generic class or material. Upon the same principle that it was held, that by imposing a duty upon "wearing apparel," it was intended to describe and tax a class of articles not known in trade and commerce by any particular appellation as respects their component material, but with reference to the actual *use for which they were designed* and to which they were adapted. Hence it has been decided that as "shawls" and "scarfs," of whatever material composed, were designed and adapted for use as wearing apparel, they must be classified and taxed as such, wholly irrespective of the material of which they were composed, and could not therefore be classified as manufactures of *silk, woolen, worsted, cotton* or mixed. (Wrelband *vs.* Seedman, 1 Blatchford, 504, affirmed in 16 Howard, 251, wherein the learned Justice of this Court, who delivered the opinion "[redacted]

illustrated the classification thus

"A stocking decked his brow instead of *hay*,
"A *cap* by night, a stocking all the *day*.")

And accordingly so long as this separate classification existed, our "embroidered slipper patterns," cut in the style and pattern and for the use above specified, could not be taxed under any general provision as manufactures of *cotton*, either plain or "embroidered or tamboured." And nothing of the kind was attempted until after 1867, when it was supposed all special provisions of law in respect to the separate classification of those articles were repealed and abolished. Which we deny.

THIRD.

In 1862, Congress passed an Act, approved July 14, 1862 (12 Statutes at Large, 549), entitled, "An "Act increasing *temporarily* the duties on imports "and for other purposes." This act was a very general and comprehensive statute, covering substantially all the matters and things included in the former act, and imposing a general and pretty uniform increase of duties, on nearly all the kinds and articles of merchandise enumerated in the Act of 1861. And by Section six of the Act it took from the free list of the previous act a variety of articles and subjected the same to an ad valorem duty of *ten per cent*. Among which were " lastings, mohair " cloth, silk twist or other manufactures of cloth, " *woven or made* in patterns of such size, *shape and* " *form* or cut in such manner as to be *fit* for shoes, " slippers, boots, &c., exclusively, not combined " with india rubber." It will be observed that this provision is *broader* and more *comprehensive* than the similar provision of the Act of 1861. For the latter act exempted from duty only such merchandise therein mentioned as should be " *cut* in strips or patterns of the size and shape for shoes, slippers," &c., while the Act of 1862, included also articles of the kind and quality specified, and all manufactures of cloth "*woven and made*," as well as "*cut*" of the " size, form and pattern specified. So,

that while this act, imposed a duty of ten per cent. ad valorem upon some articles, such as plaintiffs' goods which were before free, it also included in the ten per cent. clause "*woven and made*" articles of a similar texture, and form and size which were not before included in such exempt clause in the Act of 1861.

FOURTH.

By sec. 23 of this Act of 1862, all acts and parts of acts *repugnant to the* provisions of that act were repealed. Now, it is conceded that by these two provisions of the act of 1862, the provisions of the Act of 1861, exempting our goods from duty was repealed or suspended and in lieu thereof we were subjected to a duty of ten per cent. ad valorem.

Now, special attention is invited to the fact (which is deemed somewhat material) that in the two above-mentioned acts this particular provision is included in a general class and section along with a variety of other merchandise enumerated, all of which, in the one case, is declared exempt from duty, and in the other subjected to a duty of ten per cent. That is to say, in the Act of 1861 these goods are enumerated among a class of goods of various kinds, all which are exempt from *duty*. And in the Act of 1862 the clause in question is included among a general class of goods of various kinds, all of which are charged with a duty of *ten per centum only*.

FIFTH.

Then comes the Tariff Act of 1864, approved June 30, (13 Statutes at large, 202), entitled "An Act to *increase duties* on imports and for other purposes." Not to increase them "temporarily" as specified in the title of the Act of 1862, but without restriction as to time.

It is claimed that this act was a general revision of all the previous Tariff Acts. But there is nothing in the act to indicate that. It contains 13 sections in reference to imposing duties, and increases the duty on most of the articles enumerated in the former acts. Sometimes stating the duty imposed to be "in lieu" of former duty, and sometimes imposing it absolutely without reference to former duties.

Section 5 of this act contains *two* general subdivisions. The first imposes a specific duty per square yard on all carpets, carpeting and ruggs, and merchandise of that species. The *second* subdivision relates to manufactures of *wool* of all kinds and descriptions and contains *seven* paragraphs, and imposes a duty on each separate article or group of articles. The sixth paragraph is as follows :

"On lastings, mohair cloth, silk, twist, or other "manufacture of cloth woven or made in patterns "of such size, shape and form, or cut in such manner "as to be fit for shoes, slippers, boots, bootees, gaiters, "and buttons exclusively, not combined with india-"rubber, *ten per cent. ad valorem*," which is in the precise language of the Act of 1862, and imposes precisely the same amount of duty. But it will be observed the paragraph, is not, in this Act, included among a class of *exempt* merchandise or *ten per cent.* merchandise, among which it stood in the two former Acts, but is placed as a separate paragraph in the section as to *woolen goods* and manufactures of "mohair," "Alpaca," and "goats-hair, &c.," The paragraph preceding the one quoted, imposes 50 per cent. *ad valorem*, on "bunting" and manufactures of "worsted," "mohair," "alpacas," goats-hair," &c. And the paragraph succeeding, imposes 50 cents per yard, &c., on floor oil-cloths. The repealing clause of this statute repeals only such "acts and parts of acts as are *repugnant* to its provisions."

SIXTH.

It is a fair subject of inquiry and criticism, whether this paragraph in the Act of 1864, does or was intended to include a *manufacture of cotton* of any kind. And if so it does not in any manner affect the previous acts as to the merchandise in question in this case. But assuming that the term "other manufactures of cloth" would include the cotton slipper patterns in question here, still it is claimed that this Act of 1864, with this special provision contained in it, did not in any manner repeal or impair the same paragraph or provision in the previous Act of 1862; because the two provisions are in no way "*repugnant*," but in precise accord; they can not only "stand together," but they mutually affirm and support each other. It follows, therefore, that until something else in legislation should occur the goods in question in this case were subject to a duty of only 10 per cent. *ad valorum*. This it is supposed cannot and will not be controverted; and it was so construed by the officers of the customs.

SEVENTH.

But, thereafter, and before these goods in question were imported, something else did occur, viz.: Congress by a joint resolution approved March 2d, 1867, (14 Statutes at large, 571) expressly repealed *in hoc verba*, the above quoted "paragraph of section five," of the Act entitled "An Act to increase duties on imports and for other purposes, passed *June* 30, 1664." And the question in this case is what effect had such repeal upon the previous statutes, and upon the question of duties on our merchandise. And in regard to this we say:

1st. If the paragraph, in question, in the Act of 1862, was not repealed by being incorporated word for word in Act of 1864, (as we think it was not)

but remained in full operation then we concede and insist that it *was* repealed by necessary implication, by the express repeal of the similar clause in the Act of 1864.

2d. If the clause in the Act of 1862 is held to be superseded, and in effect *repealed*, by incorporating the same clause in the Act of 1864, then we concede it was *not revived* by the repeal of the clause in the latter Act. And this upon the well-settled rule that the Legislative body must have intended to accomplish something by the express repeal of the "slipper pattern" clause in the Act of 1864. And if by such act it *failed* to reach and abolish, or if it *revived* and called into existence a precisely similar clause in the Act of 1862, then it accomplished nothing and had no intent whatever, which is not to be assumed. On the contrary, we concede and claim that the joint resolution of repeal, of March 2d, 1867, indicated a clear purpose (which it was the duty of officers of the customs and the courts to carry into effect) that thereafter the goods included and classified in that paragraph should *not* be subjected to a duty of *ten per cent. ad valorem.* And that is just what the Circuit Court for Massachusetts decided, and *all* it decided.

EIGHTH.

It follows, therefore, that the repealing resolution of 1867 did have the effect, virtually, to expunge from the 5th section of the Act of 1864, and the 6th section of the Act of 1862, the particular paragraph in question in reference to "slipper patterns." And that all subsequent importations of such merchandise must be dealt with as if this particular paragraph was never contained in said Acts.

This was acquiesced in by the Circuit Judge. But he held, nevertheless, upon the authority of the above case, of Butler *vs.* Russel (11 In-

ternal Rev. Record, p. 930), decided by the Circuit Court of Massachusetts, that the Act of 1864 was a "General Tariff Act, intended as a "substitute for former Acts, and adopting new "principles of assessment, and that a repeal of a "particular provision of the Act of 1864 did not "revive former legislation in respect to the article "specified in the repealing Act."

And that consequently our cotton "slipper patterns" were subject to the duty of thirty-five per cent. *ad valorem*, imposed by the last clause of the 6th sec. of the Act of 1864, upon "all manufactures of cotton not otherwise provided for." We except to this and claim on the contrary that the repeal of the clauses in the Acts of 1862 and 1864, imposing a duty of ten per cent. *ad valorem* on our goods left us precisely where we were previous to the passage of these Acts, viz.: in the *free list* of the Act of 1861, and this upon the following grounds:

1st. It was by force of the provisions, or clauses, in the Acts of 1862 and 1864, imposing a duty of ten per centum upon these specified articles, designed and adapted for the specific uses named, and these clauses alone, which took our goods out of the free list of the Act of 1861.

1st. The Act of 1862 was an Act merely to impose "additional duties" upon the goods, wares, and merchandise therein enumerated. It contained no specific repealing clause, only generally repealing such Acts and parts of Acts as were "repugnant" to its provisions. There was nothing whatever in its provisions or any of them "repugnant" to the clause in the Act of 1861, *separately classifying* these articles in question, with reference to the particular *use* for which they were designed and adapted. And thus separately classified and thus segregated, from other goods of the same genus. There was no provision in the Act of 1862 "repugnant"

to their being exempted from duty except this provision charging them with a duty of *ten per cent.* 2d. The same things prescisely are true of the Act of 1864. True, the latter was a general Act, but so was that of 1862. All the difference in that respect was that the Act of 1862 was an Act to increase duties "temporarily," while that of 1864 proposed to do the same thing absolutely. True, it adopted some sifferent methods of classification; but it does not assume in any manner to alter or interfere with the classification adopted by previous Acts, except *so far* as such previous Acts and classification was "repugnant" to its provisions. And this is its express language (see sec. 22). Now it is submitted there is no clause or provision of the Act of 1864 "repugnant" to the idea of separating the articles and manufactures in question from the mass of their kind and quality, and dealing with them with reference to the *use*, than there is in separating articles of "wearing apparel" from their generic classes, and dealing with them in respect to their designed *use*. It is the clause imposing a duty of ten per cent. upon these "slipper patterns," and *that only* in the Act of 1864, which was in any way "repugnant" to their being exempted from duty under the Act of 1861 (Sedgwick on statutes, Act of 1874, p. 798; and note also Dwarris on statutes, pages 154, 155).

2d. The unqualified repeal therefore, of this "repugnant" clause in these two acts of 1862 and 1864, put these goods right back in their place in the free list of the Act of 1861, within the principles of all the decisions on the subject. (Dwarris on statutes, p. 159; Calvert *vs.* Makepeace, 1 Smith (Ind.), 86; Sedgewick on Statutes, p. 137; Gale *vs.* Mead, 4 Hill (N. Y.), 109; Hastings *vs.* Aikin, 1 Gray, 165; Vanderburgh *vs.* The Village of Greenbush, 66 N. Y. Ct. Appeals, R., p. 1; Smith's Statutes and Common Law, 909; Wheeler *vs.* Roberts, 7 Cow., 536; People *vs.* Davis, 61 Bar., 456.) The

rule is well stated by Earl, *J.*, in 61 New York R., thus: "It is a general rule that when a repealing "statute is itself repealed, the first statute is *re-* "*vived*, and it matters not whether the repeal in "either case be in express language or *by implica-* "*tion.*"

So that whether the "repugnant" and repealing clause in the Act of 1862 was repealed expressly, or by implication, it makes no difference, the first statute of 1861 was *revived.*

NINTH.

But here we are met with the proposition that the case here comes within a well defined exception to the above general rule, viz.: That when the provisions of a former statute are "revised" by a subsequent one, to such an extent and in such terms as to indicate an intent of the law makers, that the last act should prescribe the *only rules on the subject*, then the former act must be deemed repealed, although the provisions of the last act were not in all respects "repugnant" to the *former.* And applying this exception, it is claimed that the Act of 1864 was such a "revising" act, and even though it had not contained the special provision imposing ten per centum on our goods, nevertheless its general provisions would have worked a repeal of the free list of 1861, as to all articles and kinds of merchandise which would be included within its *generic* classifications. And that by implication, therefore, the clause of section 23, of the Act of 1861, which separately classified and exempted from duty our "slipper patterns," stands repealed. All which we controvert on the following grounds:

1st. These repeals by implication are "not favored," and the reason is this: "When the mind "of the legislator has been turned to the *details* of

"a subject, and he has acted upon it, a subsequent "statute in general terms, or treating the subject "in a general manner, and not expressly contra- "dicting the original act, shall not be considered as "intended to affect, the more particular, or positive "previous provisions, unless it is absolutely neces- "sary to give the latter act such a construction in "order that its words shall have *any meaning at* "*all*," (Sedgwick on Statutes, 2d Ed., p. 798). Now I understand from the opinion in Butler *v.* Russel, that the learned Justice of this Court who delivered that opinion, substantially affirms this law. For *otherwise* I should consider his opinion a *higher* authority than the author of the work cited. And assuming, therefore, that the foregoing is a fair statement of the principle and "philosophy" of the rule, it would lead at once to the repeal of the *ten per cent.* clause in the Act of 1862, but would utterly forbid any implied repeal of the provision of the Act of 1861, exempting these articles from duty.

The decisions of the Courts in England and this country on this question of repeal by implication, or rather in attempting to apply the doctrine to particular cases are so varied, that it is difficult to deduce from them any *general rule* more clear and explicit than the one above stated. And that rule is quite fully sustained by a very large number of authorities, cited and collected in a note to the above work (Sedgewick on Statutes, last ed., page 98, note.)

2d. We say that our case is squarely within this rule. 1st. It appears clearly that the "mind of the Legislator" was, in the Act of 1861, "turned to the *details* of this particular subject" of goods and merchandise of various materials *cut* in a specified size and shape, and designed for a particular specified use, and "acted upon" such subject, by separately classifying and exempting from duty these particular articles, with regard wholly to their form and use, and not their material or generic class. And

therefore, by force of the above rule, no subsequent statute in general terms, treating these goods in a general manner with reference to their quality and material, and *not* their *form and use*, and not expressly contradicting the original Act, can be held as intended to affect the *particular positive* previous provisions. And especially is that so, when every provision of the Acts of 1862 and 1864, excepting only the *repealed* paragraphs, imposing a duty of ten per cent. upon these goods, can have full and complete force and *effect* and "meaning" upon the general mass of imported merchandise, without necessarily affecting this small, segregated portion, *specially* provided for in the Act 1861 with reference to its *use*.

3d. We submit, therefore, that while the Tariff Act of 1874 is a general statute, and to a certain extent a revisionary statute, yet there is nothing in its title, its inaccting clauses, its repealing clause, or any of its provisions indicating that it was "clearly intended to prescribe the only rules on the subject." Nor is there anything in it inconsistent with the idea that while it in *general* terms imposes a duty and prescribes a rule as to all importations of "cotton," and "woollen," and "tamboured and embroidered" goods, imported in piece and in bulk for general use ; yet there may nevertheless co-exist with it a *particular* rule as to some of these goods imported in a *particular* form for a *specific use*, and especially is that so where there is no express words of the act of 1864 (the ten per cent. clause being out), repugnaent to such idea or expressly declaring that it shall be considered as prescribing the only rule, but on the contrary there are express words indicating a different intent, viz. :

"That the duties upon all goods, wares, merchan-
"dise imported from foreign countries *not provided*
"*for* in this Act, shall be and remain as they were
"according to existing laws prior to the 29th of
"April, 1864." Now this clause expressly declares, that previous laws shall be in force in regard to

levying duties upon all goods, wares and merchandise, "*not provided for in that Act.*" And so we say that this Act clearly imposes duties on cotton goods, and "woollen" and "worsted goods," and "mohair cloth," "silk" and "twist," with reference to their component materials and value, imported in the piece, and in bulk for *general* trade and commerce. But it does *not* "provide in detail for" any of this merchandise, imported in a particular specified form and size, and designed for a specific purpose of American manufacture. Yet there is a pre-existing statute (1861), which *does* provide for all this, while it at the same time provides and imposes duties upon similar goods and merchandise inported in the piece and bulk and for general trade and commerce. We say therefore that the Act of 1864 *does* provide for these goods when imported in piece and bulk as general merchandise for general *use*, but does "not provide" for them when imported in the size, form, and for the use specified. And so, therefore, by the very terms of the Act of 1864, the Act of 1861, in reference to goods imported in this particular form and for the use specified remains in full force and effect.

And in support of which, see the case of Riche *vs.* Smyth, 13 Wallace, 162, which it is claimed is an authority in *point* in support of our construction of the statute. The question in that case was, as to the duty which could be legally imposed upon "*Birds.*" In the same Sec. of the Act of 1861, which exempted our goods from duty, there was also included in one paragraph "Animals living of all kinds." And in another paragraph "Birds singing or other, and land and water fowls."

Now there would seem to be no reason whatever for this separate classification, because both of the *species* were exempted from duty, and that precise result would have been accomplished by the 1st paragraph in respect to "living animals." Nevertheless, Congress saw fit to

make this separate classification so that "birds," and "land and water fowls" were thereby separated from the *generic* class of "living animals," and *classified* separately, though no distinction was made as to *duties*; the same in all other respects, as by the same section, goods "*cut*" in the shapes and designed for use as "slippers," "shoes," &c., were separated from the general class of goods of like material. The subsequent acts of 1862 and 1864 made no provision as to "living animals," or "birds," or "land or water fowls." But in 1866 there came an act of Congress of a single section providing that thereafter a duty of twenty per centum should be levied and collected on "all horses, mules, cattle, sheep, hogs, *and other live animals*, imported from foreign countries." Held that this act did not include "birds, singing or other," although they were "live animals." The opinion covers all the principles involved in this case. It holds that the provisions of the act of 1861 were in *force*, not repealed by implication or otherwise by the act 1864, or any act, except when in direct conflict with subsequent legislation. That the Acts of 1861 and 1866 were "*in pari materia*," and must be construed with reference to each other, and that, therefore, the Act of 1866 must be limited to *domestic* "animals," or "live animals," other than "birds" and "land and water fowl." And it is submitted that if the provision of the Act of 1866 had been incorporated *into* the previous Act of 1864, the result would have been the same. "Birds, singing or other and land and water fowls" would have been duty free, and all other "live animals" 20 per cent. So also U. S. *vs.* Ulman, 4 Benedict, 547, is a case in point for us. In that case, the Government attempted to collect a duty of forty-five per cent. *ad valorem* upon an importation of "*Dutch metal*," by force of a provision in an Act of Congress of 1864, imposing a duty of the above per cent. on "all manufactures of *copper*, "or of which copper was a component material

"of chief value, not otherwise *therein provided* "*for.*" Now by the Act of 1861, "*Dutch metal*" was subjected to a duty of only *ten per cent.* It was conceded that "Dutch metal" was a composite material composed mostly of "brass." And that "brass" was a composite material composed mostly of "copper." And it was claimed, therefore, that "Dutch metal" was a manufacture of which *copper* was a "component material of chief value," "not otherwise provided for in that Act, and should be subject to a duty of 45 per cent. But the Court held otherwise, on the ground that "brass" had been specifically and separately dealt with in the Acts of 1861 and 1862 as a "metal" and an article of commerce. And that those Acts were in "*pari materia.*" And therefore, although brass was composed mainly of "copper," yet other manufactures made out of *it* such as "Dutch metal," could not, within the intent and meaning of the statutes, be properly taxable as manufactures of "copper," or of which copper was a material of chief value. And so we say, our "cut and embroidered" "slipper patterns," although composed of "cotton" and "embroidered," cannot be taxed as "manufactures of cotton not otherwise provided for."

TENTH.

But it may be insisted, and there is some general remarks to that effect in Butler *vs.* Russel (*supra*), that the joint resolution of Congress of March 2d, 1867, repealing the paragraph in the Act of 1864, imposing the ten per cent. duty on "slipper patterns," &c., taken in connection with the act approved the same day, largely increasing the duties on *woolen* and *worsted* goods, together with the subsequent resolution of March 29th, providing that the previous repeal of the clause imposing ten per cent. on goods of the size and pattern, and in-

tended for "shoes," "slippers," "*buttons*," &c., should not apply to goods intended for "*buttons*" "exclusively." all together, indicate an intent on the part of Congress to *limit* the duty to only ten per cent. on the goods intended for "*buttons*" only, and increase it to the full amount of duty imposed on all goods of similar component material imported in shape and form for "shoes," "slippers," "bootees," &c. And then having *assumed* this to be the clear and manifest intent of the Legislative body, it is claimed, *that*, is the final end of the matter, inasmuch as the "*Legislative intent*," when ascertained is to prevail over every other rule of construction. But we insist this is a "begging of the whole question." Because there is quite as much and we say more grounds for inferring an "intent" to relegate these "slipper patterns" back to their original *status*, in the free list of the act of 1861, as there is to infer an "intent" to distribute them among all the general clauses of the subsequent statutes. And if there be grounds for a fair doubt or argument as to the "*intent*," that "intent" shall be taken and adopted, which is reached in accordance with the well established rules of statutory construction. Now if we are to travel outside of those rules, and seek for an "intent" from extraneous facts and circumstances. We will find more in favor of *exemption* than there is for increase of duty on those importations. And as to that we say.

1st. We have the Act of 1861 passed when the country was just verging upon war and confronting the necessity of greatly increasing its revenues by increased duties upon all importations. Yet, Congress would not impose any tax whatever upon these particular goods imported in the form and *pattern*, and for the use specified, for "shoes, slippers, &c".

2d. In 1862 and 1864 the emergencies and necessities of the Government had greatly increased so that it became imperative to lay the heavy hands of

taxation upon every resource of the country—foreign and domestic commerce, lands and goods, and incomes. And yet the Congress say, *only ten per cent.* shall be laid on those goods cut, made and designed for this particular *use.*

3d. But now in 1867 when the emergency is past, when retrenchment is the order of the day, and reduction of taxation and encouragement of industry, trade, and commerce is the avowed policy of the Government—it is claimed that a removal of this ten per cent. tax upon these particular articles, put upon them only in the strongest emergency, is indicative of an intent to levy upon them more than *three times* the amount of tax they ever paid before. It is not consonant with reason, and such a perverse intent should not be presumed when there is any other rational interpretation. But it may be urged, Why should the "button" makers pay *ten per cent.* and the "shoemakers" pay nothing on the same goods? My answer is, that is not a question within the province of the Judiciary. It may be the "button" makers were over anxious, lest by some further legislation they might be compelled to pay more. And the converse of the question is equally pertinent. Why should the "shoemakers" pay 35 and 50 per cent. when the "button" makers pay only *ten* on the same goods?

ELEVENTH.

We submit that *Butler vs. Russel*, 11th Int. Rev. Rec. 30, is not, and should not, be an authority against us here, because,

1st. The questions in that case arise upon a demurrer to the plaintiff's declaration, from which if will be seen that the goods in question in that case would not be included in, or exempted from duty by the clause under consideration, in Sec.

23 of the Act of 1861, for the reason that they were not "*cut in strips or patterns.*" But they would and did come within the clause of the Acts of 1862 and 1864, as goods "*woven and made*" "in patterns," &c., and imported in the piece.

2d. So, therefore, the plaintiff in error in that case was compelled to stand on the single point that the "slipper pattern" clause in the Act of 1862 was in *force* after March 2d, 1867; insisting that, if it was suspended or repealed by the Act of 1864, the repealing resolution of 1867 *revived it;* and if not, the resolution did not repeal it. Now, in deciding that the ten per cent. duty on these goods imposed by the Act of 1862 was repealed, both ex-expressly and by implication by subsequent legislation, the Court in that case did not assume in any manner to determine what would be the effect of such repaal upon the provisions of the previous Act of 1861. And this is clear, from a passing remark of the learned judge, found in the opinion, thus "greater weight would be due to the suggest-"tion, if the repeal, as the plaintiff supposes, "would leave the manufactures in question "*exempt from duty.*" But it was held that could not be as to them, because in their *generic* class they were comprised within the terms of the Act of 1867, imposing duties upon manufactures of worsted, mohair, alpacca, &c. But if it had appeared that by *previous legislation* these manufactures had been otherwise specially enumerated and classified, a very different question would have arisen. And the decision might very properly, and upon every legal principle asserted in the opinion, have been given the other way. And yetitis upon the authority and reasoning of this case alone that the judgment of the Circuit Court is based.

Reference is made by the learned Circuit Judge to the case of Smyth *vs.* Fisk, 23d Wallace, 374. I

fail to see wherein that case has any application whatever to the questions involved here. That case held merely that the duty imposed by that act upon "all manufactures of silk," "*not otherwise provided for*," meant "not otherwise provided for" by *that act*. And that, accordingly, by the fair intendment of that act "silk neckties" must pay the duties imposed upon manufactures of silk "not otherwise *therein* provided for;" and it was not pretended that "silk neckties" were "otherwise provided for" in that act. But it just so happens that "slipper patters" *were* and that makes the difference.

We further cite as some authority favorable to our views the case of Arthur *vs.* Cummings, 1st Otto R., 362, as to "burlapps" and "bagging." And the case of Van Stabbe *vs.* Arthur, 13th Blatchf., 251, as to "hair and bristles."

We submit the judgment of the Circuit Court should be reversed, and judgment ordered for the plaintiffs in error for the amount of the duties exacted.

FREEMAN J. FITHIAN,

Of counsel for plaintiffs in error.

In the Supreme Court of the United States.

OCTOBER TERM, 1877.

JOHN W. KOHLSAAT AND OTHERS, PLAINTIFFS IN ERROR,
vs.
THOMAS MURPHY, COLLECTOR, &C.

No. 832.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE DEFENDANT IN ERROR.

In the Supreme Court of the United States.

OCTOBER TERM, 1877.

JOHN W. KOHLSAAT AND OTHERS, PLAINTIFFS IN ERROR,
vs.
THOMAS MURPHY, COLLECTOR, &C.
} No. 832.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE DEFENDANT IN ERROR.

This was an action brought to recover certain duties exacted, as was alleged, at excessive rates upon goods imported in 1870 and designated as "embroidered slipper-patterns" (folio 19.)

In exacting the duty in question the government had relied upon the following provision of the act of 1864, ch. 171, sec. 6, last paragraph: "*All other manufactures of cotton not otherwise provided for, thirty-five per centum ad valorem.*"

On the other hand, the importer contended that the proper statutory provision was, *either*, that of 1861, ch. 68, sec. 23 (12 Stat. at L., 195), which exempted from duty "*lastings, mohair cloth, silk twist, or other manufac-*

ture of cloth cut in strips or patterns of the size and shape for shoes, slippers, boots, gaiters, bootees, and buttons, exclusively, not combined with India rubber;" or, was that of 1862, ch. 163, sec. 6 (12 Stats. at L., 550), which imposed a duty of ten per centum ad valorem upon the subjects just mentioned (folio 21.)

The only evidence showed that the *body* of the goods in question was of cotton cut up in pieces suitable for making slippers, while the *figure* embroidered or stitched thereon, and making it a slipper-pattern, was *part worsted and part silk* (folio 24); that such body was known as *canvas* (folios 26 and 34), *stuff* (folio 31), or *cloth* (folio 32).

The above statutory provisions, or provisions similar to them, may be traced in the various customs-duties acts from that of 1864 to that of 1846, inclusive, as follows:

Act of 1864, ch. 171, sec. 5: "On lastings, mohair cloth, silk twist, or other manufacture of cloth woven or made in patterns of such size, shape, and form, or cut in such manner as to be fit for shoes, slippers, boots, bootees, gaiters, and buttons exclusively, not combined with India rubber, ten per centum ad valorem." (13 Stats., 208, sixth paragraph from top.)

"On cotton braids, insertings, lace trimming, or bobbinet, and all other manufactures of cotton not otherwise provided for, thirty-five per centum ad valorem." (*I bid.*, p. 209, fifth paragraph from top.)

Act of 1862, ch. 163, sec. 6: "Lastings, mohair cloth, silk twist, or other manufacture of cloth woven or made in patterns of such size, shape, or form, or cut in such

manner as to be fit for shoes, slippers, boots, bootees, gaiters, and buttons exclusively, not combined with India rubber." (12 Stats., 550, near top.)

"On all manufactures composed wholly of cotton bleached, unbleached, printed, or dyed, not otherwise provided for, five per centum ad valorem, *additional* to that in the act next below." (*Ibid.*, p. 554, paragraph 3 from top.)

Act of 1861, ch. 68, sec. 23: "Lastings, mohair cloth, silk twist, or other manufactures of cloth cut in strips or patterns of the size and shape for shoes, slippers, boots, bootees, gaiters, and buttons, exclusively, not combined with India rubber, exempt from duty. (12 Stat., 195, middle.)

"On all manufactures composed wholly of cotton, bleached, unbleached, printed, painted, or dyed, not otherwise provided for, thirty-five per centum ad valorem. (*Ibid.*, p. 185, second paragraph from bottom.)

Act of 1857, ch. 98, sec. 2: "Lastings cut in strips or patterns of the size and shape for shoes, slippers, boots, bootees, gaiters, or buttons, exclusively, not combined with India rubber; manufactures of mohair cloth, silk twist, or other manufactures of cloth suitable for the manufacture of shoes, cut in slips or patterns of the size and shape for shoes, slippers, boots, bootees, gaiters, or buttons exclusively, not combined with India rubber, *four per centum ad valorem*." (11 Stats., 193, toward bottom.)

"Manufactures composed wholly of cotton, not otherwise provided for, nineteen per centum ad valorem." (*Ibid.*, p. 192, last paragraph, compared with Schedule D of the act of 1846, 9 Stats., 46.)

Act of 1846, ch. 74, sec. 11, schedule 26: "Lastings suitable for shoes, boots, bootees, or buttons, exclusively, * * * manufactures of mohair cloth, silk twist, or other manufactures of cloth suitable for the manufacture of shoes, boots, bootees, or buttons, exclusively, five per centum ad valorem." (9 Stats., 48, bottom.)

"Manufactures composed wholly of cotton not otherwise provided for, *twenty-five per cent. ad valorem.*" (*I bid.*, p. 46, Schedule D.)

Act of 1842, ch. 270, sec. 2: "On all manufactures of cotton, or of which cotton shall be a component part, not otherwise specified, a duty of thirty per centum ad valorem."

It seems that no special mention is made therein of lastings, &c., as above.

Inasmuch as *lastings*, &c., are articles that may be made of *silk*, *wool*, or *cotton*, it may be instructive, although the *canvas* or *cloth* in the present case was *cotton*, to compare in general the rates imposed in the acts above cited upon lastings and manufactures of each of the above materials when designated expressly or impliedly as "not otherwise provided for."

	Silk.	Wool.	Cotton.	Lastings, &c.
1846 (9 Stats., 46)	25	25	25	5
1857 (11 Stats., 192 and 193)	19	19	24	4
1861 (12 Stats., 184, 186, and 195)	30	12 cents per pound and 30 ad valorem.	30	Exempt.
1862 (12 Stats., 550, 552, and 554)	as before.	18 cents per pound and 30 ad valorem.	35	10
1864 (13 Stats., 207, 208, 209, and 210)	50	24 cents per pound and 40 ad valorem.	35	10

Such being the state of the law, Congress, by public resolution adopted upon the 2d of March, 1867 (14 Stats. 571) repealed the paragraph upon lastings, &c., above quoted from the act of 1864; but upon the 29th of the same month, by another resolution (15 Stats., 24) provided that such repeal should not extend to lastings, &c., woven or made in patterns *fit for buttons exclusively.*

The above is all the legislation that applies to the question before the court, which is, What was the effect of the repeal of the provision for lastings, &c.? Did it restore any *express* provision upon the same subject in former statutes, or did it remit the articles to whatever provisions in the same statute would have included them had there been no *specific* provision thereupon?

The importer claims for such repeal the former effect; the government the latter. The importer contends that upon the repeal the similar provision in the act of 1862 *imposing the same rate*, or *preferably* that in the act of 1861, *exempting it from duty*, came into operation. The government contends that upon such repeal the articles fell naturally into the class described in the same act as manufactures of cotton "not otherwise provided for," and so were dutiable at thirty-five per cent.

It must be admitted by the government that the above statutes indicate a policy upon the part of Congress distinguishing by a very broad and favorable margin, maintained for twenty years, the duties upon *lastings* from those upon manufactures of the same material "not otherwise provided for."

It seems, however, a policy grounded more upon the fact that the law is so written than upon any intrinsic principle, especially upon any principle that distin-

guishes the customs-duties acts of the United States. That an article distinguished from itself (as it were) only by being in some degree more highly manufactured should in the latter condition be taxed at a rate only one-third, and even one-sixth, of the rate imposed upon it in the former condition, seems exceptional, and depends for its existence upon the words by which it is established, so that it must disappear when they do.

In this connection it is to be observed that this court, in construing the phrase "not otherwise provided for," *as contained in the act of* 1864, has said that it refers only to provisions in the same act, and not to those in preceding acts. (Smythe *vs.* Fiske, 23 Wall., p. 381.) In that case the phrase was applied to *silks*, but the construction by the court is strictly applicable here, for it cannot be contended that different meanings may be given to the phrase where the material of the lastings is "*silk cloth*" (folio 32) and where, as here, it is *cotton*.

Therefore, as the phrase "not otherwise provided for" does not refer to provisions in the acts of 1861 and 1862, it follows that the act of 1864 *even if it had never included lastings, &c., specifically, and equally so after its specific mention of them had been repealed*, superseded all previous statutory provisions whatever for duties upon manufactures of cotton.

I also here refer and rely upon the elaborate and very satisfactory opinion of Mr. Justice CLIFFORD, in the circuit court, May term, 1869, at Boston, in the case of Butler *vs.* Russell, collector, &c., reported 11 Int. Rev., Rec. page 30.

That was a case of lastings, &c., of *worsted*, imported Ma h 4, 1867; and it was held that upon the repeal of

the specific provisions therefor contained in the act of 1864, they fell under the general provision for manufactures of that material, in the same act, as subsequently modified by the act of March 2, 1867 (14 Stats., 561), viz, 50 cents per pound, *plus* 35 per centum ad valorem.

If Smythe *vs.* Fiske and Butler *vs.* Russell, which are to the same effect, have been properly decided, the question here is a narrow one, viz: Whether a rule already adopted as to *silk* and *wool* shall be followed as to *cotton*, all these materials having, as regards the matter now before the court, received the same treatment by Congress.

A reference to what occurred in Congress at the time when the resolutions of March 2, 1867, and of March 29, 1867, amendatory thereof, were adopted confirms the above conclusion. There was no debate in either House. A short statement, *in the nature of a report*, was made in both Houses by the gentlemen who had charge of the resolutions, and thereupon they were unanimously adopted. I submit the report of the proceedings at the time in the Senate as being more definite than those in the House.

"MARCH 2, 1867.

"Mr. FESSENDEN. There is a little joint resolution on the table from the House of Representatives that we may as well take up and pass now. I am satisfied it is right. It was referred to the Committee on Finance. I now report it back, and ask to have it put on its passage.

"Mr. TRUMBULL. Is that a tariff bill?

"Mr. FESSENDEN. Changing it in one particular.

"Mr. TRUMBULL. Is it increasing the tariff?

"Mr. FESSENDEN. No. Let it be read and Senators will see exactly what it is. It is merely as to the description of one article.

"The joint resolution (H. R. No. 305) to amend section 5 of an act entitled 'An act to increase the duty on imports, and for other purposes,' approved June 30, 1864, was considered as in Committee of the Whole. It proposes to repeal the paragraph of section 5 of the act of June 30, 1864, which is in these words: 'On lastings, mohair, cloth, silk twist, wool, or other manufactured cloth, woven or made in patterns of such size, shape, and form, or cut in such manner as to be fit for shoes, slippers, boots, bootees, gaiters, and buttons, exclusively, not combined with India rubber, ten per centum *ad valorem*.'

"The resolution also provides that machinery for the manufacture of beet sugar, and imported for that purpose solely, shall be exempt from duty.

"The joint resolution was reported to the Senate without amendment.

"Mr. HENDRICKS. I should be glad if the chairman of the Committee on Finance would state in a word or two what this is.

"Mr. FESSENDEN. I cannot tell without looking at the act, but my impression is that it puts these articles into a different schedule at a higher rate of duty.

"Mr. WILSON. I will simply say that some years ago, nearly twenty years ago, lastings, mohair, and other articles out of which shoes were made, were charged 20 per cent. duty, and 10 per cent. if cut in patterns. The 20 per cent. duty has been carried up to 50 per cent. duty, but the 10 per cent. duty remains as it did then, and has not been changed. The result of it is that the

wealthy manufacturers are sending to Canada and to England for these articles cut out, and they bring them into the country at 10 per cent., cheating the revenue out of 40 per cent., and nobody gets the advantage of it but these men.

"Mr. HENDRICKS. Is that all there is in the proposition?

"Mr. WILSON. It is all there is in the first section.

"Mr. FESSENDEN. The other section is simply allowing machinery for the manufacture of beet-root sugar to come in free of duty.

"The joint resolution was ordered to a third reading, read the third time, and passed."—(Congressional Globe, 1866–'67, part 3, page 1987, third column.)

[The other proceedings may be seen in the same volume, at pages 1685, 1701, 1723, 1725, 1768, 1771, and 1791.]

"MARCH 29, 1867.

"Mr. POMEROY asked, and by unanimous consent obtained, leave to introduce a joint resolution (S. R. No. 52) to exempt certain articles used in the manufacture of buttons from increased duty; which was read twice by its title.

"Mr. POMEROY. At the closing hours of the last session there was a mistake made, which is evident to every one who has had his attention called to the subject, and this resolution is to correct that mistake. The circumstances are thoroughly familiar to the Senator from Vermont [Mr. Morrill], and I have introduced this resolution on his suggestion. I ask for the present consideration of the resolution.

"Mr. MORRILL, of Vermont. For many years a pro-

vision has existed in the tariff laws allowing lastings to be imported fit for shoes and boots and for the manufacture of buttons, when imported in the shape, form, and style suited exclusively for those purposes, at a lesser rate than that imposed upon the same goods in the piece; that is, at the rate of 10 per cent. It was found that a portion of those engaged in the manufacture of shoes and boots had imported lastings in the piece, taken them to Canada in bond, and there cut them up and brought them back again, when they were only subject to 10 per cent., while many of the manufacturers of shoes and boots were not able to avail themselves of such an evasion, and it was working a great amount of inequality; and therefore those engaged in the manufacture of shoes and boots desired that the usual rate of duty should be imposed upon all lastings, so as not to permit that imported for shoes and boots to come in at any less rate than that for any other purposes. The suggestion was made by the member from Massachusetts representing the largest amount of boot and shoe interest in the country [Mr. Alley], that this should be required, and he showed me a proposition which I did not carefully examine myself, but he said it only applied to shoes and boots. I suggested to him at the time that it ought not to apply to lastings imported in that shape for the manufacture of buttons, and he told me that it did not; but it is found that the department rules that it not only applies to such goods when imported in the form adapted for the purpose of shoes and boots, but also for buttons, and it goes, therefore, much too far, and is going to work ruin and disaster to that branch of business, the button manufacture of this country.

"Mr. CAMERON. I trust we shall not pass this resolution now.

"The PRESIDENT *pro tempore.* If objection be made it cannot be passed at this time. The question is on taking it up. Objection being made, it goes over under the rule." (Congressional Globe, 1867, page 374, second column.)

[The other proceedings thereupon will be found in the same volume of the Globe,—at pages 399 and 427.]

I submit that the character of the above proceedings is such as to make them an exception to the general rule, that the intention of Congress cannot be argued from what passes in debate. On both occasions the matter was *in the nature of a report*, uttered for the information of the body, and nothing was intimated to the contrary.

It appears, therefore, that the actual intention of the legislation was that attributed to it in the cases cited above.

S. F. PHILLIPS,
Solicitor-General.